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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1954

No. 246

PAUL W. DIEHL, JR.,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF INTERVENING DEFENDANTS—RESPONDENTS

CLARENCE M. MULHOLLAND
741 National Bank Building
Toledo 4, Ohio

EDWARD J. HICKEY, JR.
620 Tower Building
Washington 5, D. C.

RICHARD R. LYMAN
741 National Bank Building
Toledo 4, Ohio

Attorneys for Intervening Defendants-Respondents System Federation No. 96 of the Railway Employes' Department, A. F. of L., and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman and Stanley J. Pavlinsky.

Of Counsel:

MULHOLLAND, ROBIE & HICKEY
741 National Bank Building
Toledo 4, Ohio

Dated at Toledo, Ohio, this
21st day of January, 1955.

INDEX

Page

Statutes Involved 1

Counter-Statement of Question Presented 1

Statement of the Case 2

Summary of Argument 6

Argument 8

I. THE SELECTIVE TRAINING AND SERVICE ACT DID NOT ENTITLE A REEMPLOYED VETERAN SUBSEQUENTLY QUALIFYING FOR A DIFFERENT AND BETTER POSITION THAN THAT WHICH HE LEFT AND TO WHICH HE WAS RESTORED, TO HAVE THE PERIOD OF HIS MILITARY SERVICE CONSIDERED AS EQUIVALENT TO ACTUAL WORKING EXPERIENCE SO AS TO ESTABLISH, *NUNC PRO TUNC*, FOR PURPOSES OF DETERMINING HIS STATUS AND SENIORITY RANKING IN THE NEW POSITION, A HYPOTHETICAL QUALIFYING DATE EARLIER THAN THE DATE OF ACTUAL COMPLETION OF THE QUALIFYING REQUIREMENTS 8

A. The Language of the Statute Fails to Support Petitioner's Claim 11

B. Congressional Rejection of Petitioner's Contentions 14

C. The Interpretation of the Statute Urged by Petitioner Has Been Rejected by the Great Weight of Judicial Authority and is Unsupported by Previous Decisions of This Court 17

Previous Decisions of this Court 30

II. ADDITIONAL GROUNDS FOR AFFIRMANCE OF THE DECISION BELOW 33

Page

Conclusion 35

Appendix 37

TABLE OF CASES

Addison v. Tennessee Coal, Iron & R.R., 204 F. (2d) 340 (decided May 15, 1953) 19, 22

Aeronautical Industrial Dist. Lodge 727 v. Campbell, 337 U.S. 521 .....8, 31

Altgens v. The Associated Press, 188 F. (2d) 727..... 22

Bostian v. Seaboard Air Line R. Co., 211 F. (2d) 867 (C.A. 4, April 5, 1954) 17, 18

Brown v. Watt Car & Wheel Co., 182 F. (2d) 570 (C.A. 6), cert. den. 340 U.S. 875 .....10, 26, 27

Campbell v. City of Haverhill, 155 U.S. 610 34

Connor v. Penna. R.R., 177 F. (2d) 854 (C.A. D.C.)... 30

Cushnier v. Ford Motor Co., 89 F. Supp. 491..... 29

Daniels v. Barfield, 77 F. Supp. 283 35

Dougherty v. General Motors Corp., 176 F. (2d) 561 (C.A. 3), cert. den. 338 U.S. 956 .....10, 28

Dwyer v. Crosby Co., 167 F. (2d) 567 27

Fishgold v. Sullivan Drydock & Repair Corp., 154 F. (2d) 785, aff'd. 328 U.S. 275 .....13, 21, 30, 32

Flynn v. Ward Leonard Electric Co., 84 F. Supp. 399 29

Ford Motor Co. v. Huffman, 345 U.S. 330 31

Foster v. General Motors Corp., 191 F. (2d) 907 (C.A. 7), cert. den. 343 U.S. 906, rehearing den. 343 U.S. 937 .....10, 28

Fries v. Pennsylvania R. Co., 195 F. (2d) 445..... 24

Gregory v. Louisville & N. R. Co., 191 F. (2d) 856 (C.A. 6), cert. den. 343 U.S. 903 .....10, 25

Page

Huffman v. Norfolk & Western Ry. Co., 71 F. Supp. 564 ..... 29, 31

Lacek v. Peoples Laundry Co., 94 F. Supp. 399 35

Lee v. Union Pacific Railroad, decided September 18, 1954, and unofficially reported at 34 LRRM 2776, and 26 CCH Labor Cases, No. 68,698 28

Lesher v. P. R. Mallory & Co., 166 F. (2d) 983 26

Marque v. Stern, 88 F. Supp. 306 35

Monticue v. Baltimore & O. R. Co., 91 F. Supp. 561 29

Morris v. C. & O. Ry. Co., 171 F. (2d) 579 (C.A. 7) 30

Oakley v. Louisville & N. R. Co., 338 U.S. 278 ..... 21, 31, 32, 33

Polansky v. Elastic Stop Nut Corporation, 78 F. Supp. 74 35

Raulins v. Memphis Union Station Co., 168 F. (2d) 466 (C.A. 6) 25

Seattle Star, Inc. v. Randolph, 168 F. (2d) 274 23

Siaskiewicz v. General Electric Co., 166 F. (2d) 463 (C.A. 2) 28

Spearmon v. Thompson, 167 F. (2d) 626 (C.A. 8), cross-petitions for cert. den. 335 U.S. 822 (Thompson v. Spearmon) and 335 U.S. 886 (Delozier v. Thompson) 30

Special Service Co. v. Delaney, 172 F. (2d) 16 22

Trailmobile Co. v. Whirls, 331 U.S. 40 ..... 7, 12, 30, 35

Trischler v. Universal Potteries, Inc. 171 F. (2d) 707 24

Walsh v. Chicago Bridge & Iron Co., 90 F. Supp. 322 34

Woods v. Glen Alden Coal Co., 73 F. Supp. 871 29

Zaversnik v. Union Pac. R. Co., 95 F. Supp. 209 29

Page

STATUTES

Purden's Pennsylvania Statutes Annotated, Title 12, Sec. 31 34

Selection Training and Service Act of 1940, as amended, 54 Stat. 885; 50 U.S.C. App. Sec. 301 et seq. 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 24, 26, 33, 34

Selective Service Act of 1948, 62 Stat. 604, 50 U.S.C. App. Sec. 451, et seq. 1, 14, 15, 16

MISCELLANEOUS

H.R. 6401, 80th Congress, 2nd Session 14

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF INTERVENING DEFENDANTS—RESPONDENTS

STATUTES INVOLVED

The material provisions of the Selective Training and Service Act of 1940, as amended (54 Stat. 885, 50 U.S.C. App. Sec. 301 et seq.), and of the Selective Service Act of 1948 (62 Stat. 604, 50 U.S.C. App. Sec. 451 et seq.), including portions omitted by petitioner but vital to the questions of interpretation presented here, are set forth in an Appendix hereto.

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether a veteran restored to the same position he left to enter the armed forces, with all of the contractual rights and incidents of that position including accumulated seniority for the period of his absence, and who subsequently completes a period of working experience which for the

first time, by virtue of a collective bargaining agreement negotiated more than three (3) years subsequent to his reemployment, qualified him for promotion to a different and better position, entirely separate and distinct from his former position insofar as seniority and seniority rights are concerned, is entitled by virtue of the requirements of the Selective Training and Service Act of 1940, as amended, to have his seniority ranking in the new position fixed not on the basis of his actual completion of the required working experience, as prescribed by the agreement under which he became eligible for promotion, but on the basis of the date on which he could have completed it had he not entered military service.

STATEMENT OF THE CASE

As noted in the opinion of the District Court (R. 35a), although both sides filed affidavits in connection with their motions, "no substantial issue of fact is raised by them and they are in the main merely explanatory". However, although the factual statements in petitioner's brief are in general correct, some elaboration is required for a complete and accurate factual picture.

While it is true that petitioner was at all times material hereto a member of the craft or class of respondent Railroad Company's employees known as "carmen", it should be emphasized that the craft is composed of several completely separate and distinct categories or classifications, among which are those of carmen mechanics (also sometimes referred to as "journeymen"), apprentices, and helpers. By virtue of agreements between the Railroad Company and the collective bargaining representative, respondent System Federation No. 96, employees in each of these categories possessed certain rights, entitling them to certain preferences in their employment, such as in or-

der of layoffs and recall to work, dependent upon their length of service, or amount of seniority, in the particular classification. But an employee can hold seniority in only one of such classifications at any time, dating from the time he was first regularly or permanently assigned to a position in such classification at his point of employment. (R. 9a, 10a.)

Normally, under Rules 32 (R. 43) and 120 (R. 22a) of the basic or "schedule" agreement between the System Federation and the Railroad Company, the only persons qualified to perform mechanic's work were those who had served an apprenticeship, or who had accumulated 4 years' practical experience at mechanic's work and could prove their mechanical ability. However, to relieve a wartime shortage of qualified journeymen, it became necessary to use helpers and other unqualified classes of employees to fill in on mechanic's work; and the System Federation and the Railroad Company, on August 29, 1944, entered into a memorandum agreement which provided, among other things, that helpers who were temporarily "set up", or "upgraded" to perform mechanic's work would receive the mechanic's rate of pay for the work to which they were assigned, but would retain their helper's seniority rights and would not acquire any permanent status, or seniority as mechanics. (R. 10a, 13a-15a.)

Petitioner was given an upgraded assignment on February 19, 1943, and had performed mechanic's work on this temporary basis for approximately two months when he entered the armed forces on April 15, 1943. Upon his return he was reemployed by the Railroad Company on November 12, 1945, was restored to his former position as helper, was given the same helper's seniority "date" he had when he left (thus accumulating helper's seniority during his absence in the armed forces), and was again placed in an upgraded status and temporarily assigned to

the performance of mechanic's work at the mechanic's rate of pay. (R. 11a.)

It was not until March 1, 1949, that any helper upgraded under the wartime memorandum agreements was permitted to acquire permanent status and seniority as a carman mechanic. On that date, by a memorandum of agreement negotiated between the Railroad Company and the System Federation (R. 16a-20a), it was agreed that carman helpers who were still working on upgraded assignments, as temporary mechanics, and who had worked on such assignments for at least 1160 days, would be permitted to elect to take permanent mechanic's status and seniority and to forfeit their seniority as helpers. Persons making this election were all to receive a mechanic's seniority date of March 1, 1949, the effective date of the agreement, but the criterion adopted for determining their seniority ranking on the roster as among themselves[1] was the order in which they had acquired the necessary 1160 days' experience at the upgraded work. (As noted in one of the affidavits filed below (R. 12a), this criterion of 1160 days' experience is comparable to the journeymen's qualification requirement, in the basic agreement, of 4 years' practical experience at mechanic's work.) As written, interpreted and applied, this agreement required 1160 days of *actual working experience.* This qualification requirement was *not* satisfied by the *mere passage of time* following the employee's upgrading. Non-veteran employees whose service was interrupted by illness or leave of absence could not apply the time they were absent against the 1160-day requirement. (R. 12a-13a.)

Petitioner and a number of other upgraded helpers made this election and were placed on the mechanics' roster with seniority dates of March 1, 1949 (R. 33a); certain of these others (the individual intervening defendants-respon-

[1]The matter in dispute here.

dents herein) had completed their 1160 days' experience earlier than did petitioner, and hence were listed ahead of him on the mechanics' roster (R. 33a-34a).

The complaint alleged that if petitioner had remained in the Railroad Company's employ instead of entering the armed forces, he would have completed his 1160 days' experience at the upgraded work earlier than he in fact completed it; and that if such had been the case, he would now enjoy a position on the mechanics' seniority roster ahead of the four individual intervening defendants-respondents. It was claimed that the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U.S.C. App. Sec. 301 et seq.), as amended, required that he be accorded that superior position.

Motions to dismiss were filed in the District Court both by the Railroad Company (R. 7a) and the intervening defendants (R. 27a).[2] An affidavit in support of the Railroad Company's motion (R. 8a) was received as permitted by Rule 12 (b) of the Federal Rules of Civil Procedure. Petitioner filed a counter affidavit (R. 24a), and a motion for summary judgment with supporting affidavit (R. 29a), and the Railroad Company filed a counter affidavit (R. 9a).

The District Court granted the motions to dismiss after noting that there was no substantial disagreement as to the facts of the case. In its opinion (R. 35a) the trial court pointed out that the plaintiff had been restored to the same position he had left without loss of seniority and with

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[2]Among the grounds urged in support of the intervening defendants' motion were (1) lack of jurisdiction of the subject matter, if the complaint were construed as asserting rights under the applicable collective bargaining agreements rather than the Selective Training and Service Act, and (2) that the action was barred by limitations and laches. In the proceedings below petitioner disavowed any intent to rely on the agreements rather than the Act. The questions of limitations and laches were not decided by either court below, but these objections are fully sustained on the record herein, and constitute separate grounds for affirmance. "A reviewing court may look into the record; and if the judgment below appears to be right for any reason, it is the duty of the reviewing court to affirm it." (3 Am. Jur., "Appeal and Error", p. 674.) "A respondent or an appellee may urge any matter appearing in the record in support of a judgment . . ." LeTulle v. Schofield, 308 U.S. 415.

seniority credit for the time he had been in military service, "in exact compliance with the provision of the Act that he be considered as having been on furlough or leave of absence." (R. 37a-38a.) The District Court was of the view that the subsequent union agreements were not invalid because they in no way operated to impair the seniority status to which the plaintiff was entitled when he returned from the armed forces. (R. 36a-37a.) The opinion further pointed out that the law does not attempt to restore or compensate or give to the veteran the equivalent of lost opportunities (R. 38a), nor require that military service be taken as the equivalent of experience in the craft (R. 39a).

The Court of Appeals below affirmed, saying:

> "... The decision of the court below fitted Diehl precisely into the seniority system created by the March 1, 1949 Agreement. He is dealt with on a parity with other employees who are non-veterans. To put him above the four individual appellees would seem to award him a kind of superseniority not contemplated by any statute." (R. 59-60; 211 F. (2d), p. 100.)

SUMMARY OF ARGUMENT

The reemployment provisions of the Selective Training and Service Act of 1940 entitled the returning veteran to restoration to his former position, with accumulated seniority for the period of his absence and full enjoyment of the rights and incidents of the position to which he was thus restored, to the same extent as if he had been on furlough or leave of absence from it during his military service. Neither the language of the statute, its legislative history, nor decisions of the courts interpreting it support the theory of any mandatory requirement that in addition the veteran must be given, *nunc pro tunc*, a retroactive status

and seniority in a different and better position for which he is able to qualify subsequently to his reemployment, and for which he could have qualified earlier only by undergoing a prescribed course of training or by accumulating a specified amount of actual working experience.

Petitioner's contentions are in direct conflict with the clear wording of the statute. Congress has refused to amend the Act so as to incorporate the guarantees sought by petitioner, but has contented itself with a statement of policy indicating that while such advantages to veterans are favored, they are not mandatory. The courts have overwhelmingly rejected petitioner's arguments with respect to the interpretation of the Act.

The question here presented has not previously been decided by this Court, none of the cases before it having turned upon a differentiation between the status which the veteran would have enjoyed had he been on furlough or leave of absence, and that for which he could have qualified only through working experience or training gained from actual presence on the job.

In addition to the basic question involved, affirmance of the decision below is warranted by virtue of petitioner's laches in asserting his claim, and also because the unusual facts of this case bring it squarely within the doctrine of *Trailmobile Co. v. Whirls*, 331 U.S. 40.

ARGUMENT

I. THE SELECTIVE TRAINING AND SERVICE ACT DID NOT ENTITLE A REEMPLOYED VETERAN SUBSEQUENTLY QUALIFYING FOR A DIFFERENT AND BETTER POSITION THAN THAT WHICH HE LEFT AND TO WHICH HE WAS RESTORED, TO HAVE THE PERIOD OF HIS MILITARY SERVICE CONSIDERED AS EQUIVALENT TO ACTUAL WORKING EXPERIENCE SO AS TO ESTABLISH, *NUNC PRO TUNC*, FOR PURPOSES OF DETERMINING HIS STATUS AND SENIORITY RANKING IN THE NEW POSITION, A HYPOTHETICAL QUALIFYING DATE EARLIER THAN THE DATE OF ACTUAL COMPLETION OF THE QUALIFYING REQUIREMENTS.

In this action petitioner is asserting purely statutory rights, and in order to prevail must bring himself within the scope of the statute relied upon. His eligibility as a veteran for whatever reemployment rights the Selective Training and Service Act gave him is not in issue here, but the question is simply one of statutory interpretation with respect to the scope of the rights created by the Act.

When he entered the armed forces, petitioner held a position as helper, with seniority rights in that classification only. Under the applicable agreements, his upgrading or temporary assignment to carman mechanic's work carried with it no right to establish seniority or permanent status in the latter classification. Here, as in most railroad employment, completely separate and distinct seniority units prevailed for the various crafts of employees and subdivisions within the crafts, such as those of helper and carman mechanic involved here.[3]

[3]As Mr. Justice Frankfurter observed in the Court's opinion in *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 526-527: ". . . There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority

(Footnote continued on next page)

Upon his return from the armed forces petitioner was restored to his helper's position and again placed on the same upgraded or temporary assignment to carman mechanic's work. It is not contended that he failed to receive his full helper's seniority rights, including accumulated seniority for the period of his absence in the armed forces. For more than 3 years following his reemployment petitioner's status remained unchanged, until on March 1, 1949, solely by virtue of the collective bargaining agreement negotiated at that time, he and other "upgraded" helpers first became eligible to apply for permanent status as carmen mechanics. That eligibility was not an attribute of their seniority as helpers, but rather of the working experience acquired on the temporary assignments to carman mechanic's work. There is no contention that petitioner was ever denied any of the rights and attributes of his restored position of helper, or the fruits of accumulated seniority.

The challenge rather is to the validity of petitioner's seniority ranking, in the mechanics' seniority unit, on the basis of the date on which he actually completed the working experience requirement, as provided in the March 1, 1949, agreement, rather than the date on which he could have completed it if he had not entered military service. While none of the upgraded helpers were given mechanic's seniority antedating March 1, 1949, petitioner and others who had previously accumulated the requisite 1160 days' experience, while all being given mechanic's seniority as of that date, were ranked among each other in the order of their completion of the 1160 days.

Petitioner takes the broad position that the Selective Training and Service Act did not merely entitle him to be

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in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination . . ."

restored to his former position, without loss of seniority, and to be considered as having been on furlough or leave of absence from that position, but that in addition, at each future step in his employment career, as he qualifies himself for different or better positions, he must be given "*nunc pro tunc*", a retroactive, hypothetical status in the new seniority unit. In effect, graphically if ungrammatically, the contention is that the Act not only guaranteed the reemployed veteran against having to start his career all over again, by permitting him to "take up where he left off", but that it further provided for his advancement to new and different positions to the same extent as if he had been working on the job during the entire period of his absence.

The argument thus advanced by counsel for petitioner is not novel, and its rejection by the District Court and the Court of Appeals below was preceded by a series of decisions by numerous other federal courts, over a period of a number of years, refusing with substantial unanimity to adopt the strained interpretation of the statute now urged upon this Court. Unsuccessful attempts to obtain a review of several of those decisions were based upon precisely the same theory as that now advanced on behalf of petitioner.[4] While this Court has not previously passed upon the question presented here, its previous decisions dealing with veterans' reemployment rights not only fail to support petitioner's contentions but we believe point the way for their rejection. No language can be found in the statute to support the theory urged, but instead the clear wording of the Act completely fails to encompass the type of advantage sought by petitioner. And perhaps most conclusive, and precisely contrary to what counsel for petitioner would

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[4]*Dougherty v. General Motors Corp.*, 176 F. (2d) 561 (C.A. 3), cert. den. 338 U.S. 956; *Foster v. General Motors Corp.*, 191 F. (2d) 907 (C.A. 7), cert. den. 343 U.S. 906, rehearing den. 343 U.S. 937; *Gregory v. Louisville & N.R. Co.*, 191 F. (2d) 856 (C.A. 6), cert. den. 343 U.S. 903; *Brown v. Watt Car & Wheel Co.*, 182 F. (2d) 570 (C.A. 6), cert. den. 340 U. S. 875.

have the Court believe, is the fact that Congress itself has plainly refused to accord to returning veterans any legally enforceable rights of the type here sought.

In line with the foregoing observations, we shall accordingly direct our attention in turn to the language of the statute involved, its legislative history bearing upon the question at issue, and the authorities dealing with the question.

A. The Language of the Statute Fails to Support Petitioner's Claim.

Although petitioner predicates his claim upon the Selective Training and Service Act, there is no language in the Act which supports his contention.

The Act requires that in the case of a veteran who left a position, other than a temporary position, in the employ of a private employer, "such employer shall restore such person *to such position* or to a position of like seniority, status and pay." (Sec. 8 (b) (B); emphasis supplied.)

But petitioner seems to claim that when Congress said the veteran must be restored to his former position that is not what it meant; that it intended rather that the veteran must be restored *not* to his former position, but to whatever different position or status he might have been able to achieve, either before or after his return and reemployment, if he had remained on the job and accumulated working experience instead of entering the armed forces. We do not agree that the quoted portion of the Act is subject to an interpretation which is so much at variance with the actual language used by Congress. On the contrary, subsequent portions of the Act contain language which, in our opinion, directly precludes any such interpretation.

Having set up the requirement that returning veterans

must be restored *to their former position,* Congress then went on to define precisely the status and rights of persons *so restored.* In so doing it provided in Section 8 (c) of the Act, that:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces* * * *" (Emphasis supplied.)

Petitioner has presented an intricate and extensive grammatical argument, at pages 12-16 of his brief, the gist of which, insofar as we can follow it, appears to be that the foregoing portion of Section 8 (c) of the Act was not intended to limit or define, or presumably have any relation whatsoever to, the other provisions of Section 8 (b) and (c). It is argued that none of the several clauses of 8 (c) "modifies another, or relates to the additional rights conferred by 8 (b)" (br., p. 12).[5] But the discussion fails to show by what process of transmutation the requirement of Section 8 (b) that veterans be restored to their former positions is converted into a statutory command to place them in new and completely different positions. Nor is it explained why all of the provisions of Section 8 (c), which petitioner says create rights unrelated to those of 8 (b), are by their express wording made referrable to the preceding section (e.g., "shall be *so restored* without loss of seniority", and "shall not be discharged from *such position*").

The fact is, of course, that while Section 8 (c) was added to the Act, by an amendment made during committee hearings before the statute was adopted, in order to aug-

[5]Insofar as it is comprehensible, petitioner's grammatical argument appears substantially the same as that urged by the Government, and rejected by this Court, in *Trailmobile Co. v. Whirls,* 331 U.S. 40, at pp. 53-56. There the Court concluded that "The restoration provisions define the very character of the place . . . to which the veteran must be restored." (p. 55.)

ment the benefits conferred by Sections 8 (b) (B), Congress just did not go quite so far as petitioner contends in supplementing the bare requirement of restoration to the veteran's former position. As Judge Learned Hand observed in *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. (2d) 785, affirmed by this Court at 328 U.S. 275:

> "... As subsection B reads, it would probably be understood to restore the veteran only to that same position which he held when he was inducted * * * To remedy this, by an amendment made while the bill was in Congress, *he was given the same status that he would have had, if he had been 'on furlough or leave of absence' while he was in the service. How far that differed from his position, had he remained actively at work, does not appear; but clearly the amendment presupposed that a difference there might be* * * *"
> (154 F. (2d) 785, 788; emphasis supplied.)

Petitioner would have the Court conclude, as a result of this elaborate grammatical argument and discussion of the legislative history of the 1940 Act, that the final language adopted by Congress, with respect to considering the returned veteran as having been on furlough or leave of absence, was in no way indicative of the veteran's restored employment status; but the only explanation offered as to the meaning of the phrase is that it was intended as "an improvement in draftsmanship" and "to afford broader and more definite protection".

Nowhere, however, does petitioner point to language in the Act supporting his contention that Congress was not attempting to restore the veteran's former seniority position, but instead sought to give him seniority rights and status not previously held, in a position completely new and different from that which he left to enter the armed forces, for which he was not qualified upon his return, and for which he could not have become qualified if he had been

on furlough or leave of absence during the period of his military service.

B. Congressional Rejection of Petitioner's Contentions

Although petitioner asserts that his interpretation of the statute has been endorsed by Congress, quite the contrary is true. The fact is, of course, that there is nothing in the legislative history of the 1940 Act to justify petitioner's interpretation of it, and subsequent legislative developments in fact clearly demonstrate the unwillingness of Congress to go to the extreme urged by petitioner.

Thus, when the Selective Service Act of 1948 (50 U.S.C. App. Sec. 451, et seq.) was under consideration, the following language embodied in H.R. 6401, 80th Congress, 2nd Session, was proposed to be included in order to entitle returning veterans to be restored not just to their "former positions", as in the 1940 Act, but to other and different positions to which they might have been promoted had they not been absent:

> "Sec. 8 (d) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed forces, *shall be entitled to all promotions*, increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority to *which he would have been entitled had he been working for the employer during his period of service in the armed forces* * * *" (Emphasis supplied.)

Congress did not include the above quoted language in the Act as finally adopted, but instead adopted the following provisions:

"(2) *It is hereby declared to be the sense of the Congress* that any person who is restored to a position in accordance with the provisions of paragraph (a) or (B) of subsection (b) *should* be restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." (Emphasis supplied; Selective Service Act of 1948, Section 9 (c) 2).

That the language last quoted above was intended to be *precatory* and not mandatory is clearly indicated by a reading of the following provisions of Section 9 (b) of the 1948 Act imposing mandatory obligations to reemploy veterans upon (A) the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, and (B) upon private employers, but providing only for a "precatory" or suggested treatment of veterans who left the employment of (C) any state or political subdivision thereof:

"(A) if such position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia, *such person shall* • • • be restored to such position • • •

"(B) if such position was in the employ of a private employer, *such person shall* • • • be restored • • • to such position

"(C) if such position was in the employ of any State or political subdivision thereof, it is hereby *declared to be the sense of the Congress that such person should* • • • be restored to such position • • •"[6] (Emphasis supplied.)

Furthermore, it should be noted that in Section 9 (d)

[6]The quoted "sense of the Congress" language is identical with that appearing in Section 8 (b) (C) of the 1940 Act.

of the 1948 Act, providing for court action to enforce the obligations of the statute, no provision is made for enforcement of Section 9 (c) (2), paragraph (d) reading in part as follows:

> "(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) *or subsection (c) (1)*, the district court", etc. (Emphasis supplied.)

We submit that the rejection by Congress of a proposal for the express guaranty of promotions for veterans, and the substitution therefor of language which on its face does not require such treatment but merely suggests its desirability as a matter of policy, clearly demonstrates that Congress did not wish to create any such rights as petitioner asserts in a legal, or mandatory, sense, but was content with the statement of a policy the application of which it desired but did not require.

It is of course apparent from the above discussion that we do not agree with the Court of Appeals below that the provisions of Section 9 (c) (1) of the 1948 Act are in conflict with the above-quoted terms of Section 9 (c) (2), but instead feel that they are in fact definitely "reconcilable"; and as so reconciled it is clear that they not only support but require the ruling arrived at by the court below.

In view of this legislative background, and the clear rejection by Congress of the theory urged here by petitioner, it becomes apparent that litigation such as this simply constitutes an attempt to obtain from the courts, under the guise of statutory interpretation, benefits which Congress has expressly refused to confer.

C. The Interpretation of the Statute Urged by Petitioner Has Been Rejected by the Great Weight of Judicial Authority and Is Unsupported by Previous Decisions of This Court.

In spite of the fact that no previous decision of this Court turned upon a consideration of the issue here presented, petitioner's argument is based almost entirely on the bold assertion that the theory which he here urges has been the *ratio decidendi* of every important case in which the Court has dealt with the subject of veterans' reemployment rights. (Br., p. 6.) No decisions of any other courts have been cited to support the interpretation of the statute for which petitioner contends, and the overwhelming weight of contrary decisions by eminent federal judges, literally throughout the length and breadth of the land, is cavalierly disposed of as recalcitrance and repudiation of this Court's views. (Br., p. 11.)

We do not share petitioner's apparent appraisal of the present state of the authorities as constituting a revolt of the federal judiciary against this Court's authority, or indeed his view that the Court has decided the question here in any case previously before it. We shall therefore direct attention to a number of decisions of the lower federal courts dealing directly with this problem, with the thought that while not of course binding upon this Court, they reflect the opinions of many eminent judges which are entitled to consideration, and which may be helpful to the Court in arriving at its decision here. And with these cases as a background, we shall conclude this portion of our brief by pointing out the erroneous nature of the conclusions which petitioner seeks to draw from the five decisions of this Court upon which he relies.

The most recent Court of Appeals decision, handed down subsequently to that of the court below, is the ruling in *Bostian v. Seaboard Air Line R. Co.*, 211 F. (2d) 867

(C.A. 4, April 5, 1954), which rejected the contention that veterans restored to positions as apprentices, and subsequently completing their terms of apprenticeship and receiving positions as journeymen mechanics, were entitled by the statute to a *nunc pro tunc* antedating of their mechanics' seniority to correspond to the dates on which they could have completed their apprenticeships had they not entered military service. The court said:

> "We think it clear that the statute was complied with. It is well settled that what the employee is entitled to under the statute is to be restored to the position which he left with the seniority that he would have had if he had remained working in that position, not to be promoted to another position that he might have obtained if he had not left or to be awarded seniority in such position . . . ." (Citing, p. 868, the decision of the Court of Appeals below in this case, as well as numerous other decisions embodying the same holding.)

Petitioner urges (Br., p. 11) that in deciding the *Bostian* case the Fourth Circuit did not consider this Court's views "worth a passing mention". This presupposes that the Fourth Circuit agreed with the position of counsel for petitioner as to what this Court's views were; but the fact is that it obviously did not.[7] Precisely the same theory of statutory interpretation urged by petitioner here was advanced in the Government's brief in the *Bostian* case, and was the subject of the entire oral argument before the Court of Appeals, which directed extensive and searching questions to counsel in connection therewith. It is simply inaccurate for petitioner to imply that his arguments urged here were not fully presented to and considered by the Fourth Circuit.

The same representations as to this Court's views

[7]The veterans in the *Bostian* case were represented before the Court of Appeals by Mr. Leet, counsel for petitioner here, when he was Chief Counsel of the Veterans' Reemployment Rights Division of the Department of Labor.

were made to the Court of Appeals for the Fifth Circuit in another recent case, *Addison v. Tennessee Coal, Iron & R.R.*, 204 F. (2d) 340 (decided May 15, 1953), in which the veteran was also represented by Government attorneys, including representatives of the Department of Justice in Washington. It is apparent from the court's opinion that Government Counsel representing the plaintiff advanced the same arguments as here with respect to the "escalator principle", the effect of the *Fishgold* and *Oakley* decisions, and the legislative history in connection with the 1948 statute. These arguments are all specifically considered and rejected in the court's opinion, and (contrary to the impression which petitioner seeks to convey in footnote 7, p. 11, of his brief here) the "furlough or leave of absence" test adopted in affirming the District Court's dismissal of the action.

In the *Addison* case, the plaintiff veteran had completed a portion of his apprenticeship training at the time of entering the armed forces, and upon his return and reemployment he completed the balance of his training and was assigned to a position as journeyman machinist, with seniority as such beginning on the date of such assignment. He contended that he should instead be given journeyman's seniority dating from the time he would have completed his apprenticeship training had he not been absent in military service. In rejecting this contention, the court said:

> ". . . It was the established practice that all time lost by an apprentice due to illness, vacation, leave of absence, lay-off, work stoppage or any other cause had to be made up before the apprentice could complete the training program."
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> * * * * *
>
> "The trial court rejected Addison's contention that he is entitled to have his seniority as journeyman machinist dated retroactive to September 7, 1944, un-

der Sections 8 (b) and (c) of the Act, *supra*. It held that while a veteran is entitled to be restored without loss of seniority to the position which he left when he entered upon military service, he is not entitled to seniority in a position which he might have obtained had he not left the employment. In applying this rule to the facts of this case, giving consideration to the fact that the apprenticeship training program could not be completed unless the prescribed number of training hours were actually achieved by the trainee, and that both under the terms of the program and the established practice of the employer all time lost by the apprentice due to illness, vacation, leave of absence, or any other cause, had to be made up before he was entitled to be termed a tradesman in his line, the court concluded that Addison was entitled to seniority in the position of journeyman machinist on the date he actually completed the training program and was assigned to that position, and not prior thereto.

"The contention of Government counsel, appearing on behalf of appellant,[2] that this holding is erroneous is supported by an impressive argument and brief. In general effect, the argument is that Section 8 of the statute, *supra*, guarantees the plaintiff-appellant the right to seniority as a machinist computed from the date upon which he would have been so classified if he had remained continuously in his civilian employment and excuses such veteran's failure to satisfy conditions of promotions during his absence, and that the court should reconstruct the course of employment which he would have followed if he had remained in civilian employment and ascertain when he would have been so classified and enforce the veteran's rights accordingly.

"The former decisions of this Court invalidate the appellant's contentions and settle the question sought to be presented. They establish that where an employee has no fixed or absolute right to promo-

"[2]As provided in Section 8 (e) of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. (App.), Section 308 (e)." (Footnote as in court's opinion.)

tion, and where his right to promotion depends upon qualifications over and above mere length of service, the returning veteran is entitled only to be restored to the same position, or one of like seniority in status and pay, which he held at the time of his induction into the service, plus accumulated seniority,[3] that while entitled 'to the same job . . . he is not entitled to promotions received by his successor during his absence;'[4] that the Act requires the returning serviceman to be 'considered as having been on furlough or leave of absence', and thus, where promotion or pay is dependent upon qualifications other than mere length of service, the time of service in the armed forces cannot be treated as the equivalent of such qualifications.[5] Other courts of appeals have similarly construed and applied the pertinent provisions of the Act.[6]

"We do not consider that the controlling effect of our decisions referred to is affected by the decision in *Oakley v. L. & N. R.R. Co.*, 338 U.S. 278, upon which counsel for appellant heavily rely, as 'a significant amplification of the escalator principle first set out in *Fishgold v. Sullivan Corp.*, 328 U.S. 275.' Our decisions have consistently cited and applied the principles of the *Fishgold* case. The question here involved was not presented for decision in the *Oakley* case, *supra*. The question there related to a veteran's employment seniority status subsequent to the one year employment period provided by the statute. Neither do we find, as confidently urged by the appellant, that the language of Section 9 (e) (2) of the Selective Service Act of 1948[7] is effective as a legislative construction

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"[3]*Harvey v. Braniff International Airways*, 164 F. (2d) 521; *Oil Workers International Union v. Sinclair Refining Co.*, 171 F. (2d) 192.

"[4]*Special Service Co. v. Delaney*, 172 F. (2d) 16, 19.

"[5]*Altgens v. The Associated Press*, 188 F. (2d) 727; *Lipscomb v. Tenn. Coal, Iron & R. Co.*, 189 F. (2d) 708. See also *Doyle v. Division No.* 1127, 76 F. Supp. 655, affirmed 168 F. (2d) 876.

"[6]*Raulins v. Memphis Union Station Co.*, 6 Cir., 168 F. (2d) 470; *Hewitt v. System Federation No.* 152, 7 Cir., 161 F. (2d) 545; *Spearmon v. Thompson*, 8 Cir., 167 F. (2d) 626; *Nevins v. Curtiss-Wright Corp.*, 6 Cir. 172 F. (2d) 535; *Gregory v. Louisville & N. R.R.*, 92 F. Supp. 770, affirmed 191 F. (2d) 856."

"[7]62 Stat. 604 50 U. S. C. (App.) Section 459.

(Footnotes as in court's opinion.)

of the former Act and requires, in this case, the application of different principles than those above referred to."[8]

[8]*Nevins v. Curtiss-Wright Corp., supra.*" (Footnote as in court's opinion.)

In the case of *Altgens v. The Associated Press*, 188 F. (2d) 727, cited in the footnote to the above quotation from the *Addison* opinion, the Fifth Circuit had rejected a contention by the veteran plaintiffs that time spent in the armed forces must be treated as time in the active service of the employer, so as to give them the rate of pay to which the step-rate system prescribed by applicable union agreement would have entitled them had they not been absent. In that case, the court said:

"Time spent in the service of our armed forces, however, praiseworthy it may be, is not necessarily wire-photo experience in any sense of the word, and we can find no language in the statute which authorizes us to call it such.

"The Act by its terms requires the returning service man to be 'considered as having been on furlough or leave of absence' during his military service, and clearly does not require him to be put in a position, when he returns, that he could not have attained had he not had a certain amount of experience * * *"

The same court, in the case of *Special Service Co. v. Delaney*, 172 F. (2d) 16, also noted in the *Addison* opinion, rejected a veteran's claim to a promotion that he said he would have received if he had not been in the armed forces, saying:

"The plaintiff sought to buttress his claim for the apprentice job by showing that his successor as a laborer was upgraded to an apprentice when the company ceased to use laborers in New Orleans. This does not establish a claim to the position of apprentice, for, although the returning service man is en-

titled to the same job he had on leaving for military service, he is not entitled to promotions received by his successor during his absence. * * *

"From the facts proved, Rosario Delaney was, while employed by Special Service Co., engaged as a laborer and was forbidden by the union contract and by company policy to engage in mechanics' work, and, further, the position of apprentice then, as at the present time, constituted a higher classification of employment. The law is clear that under the statute, 50 U.S. C.A. Appendix, Sec. 308, the employee is entitled to his old job or an equivalent job but is not entitled to advance to a higher classification, in the absence of some particular agreement of employment during his service with the Armed Forces."

In the case of *Seattle Star, Inc. v. Randolph*, 168 F. (2d) 274, decided by the Court of Appeals for the Ninth Circuit, the plaintiff veterans claimed that when their employer dispensed with their services, along with those of a number of other employees, upon termination of its business, their severance pay (to which all employees were entitled under the union agreement) had to be computed as if they had remained in the active service of their employer during the period of their military service. In rejecting this contention, the court said:

"Therefore, since 308 (c) provides that time spent in the armed forces should be considered as time spent on furlough or leave of absence, such time cannot be counted as continuous service time for the employer because of its exclusion therefrom by clause 6 of Article VIII of the contract in effect at the time they entered the service.

"It is argued that unless the contract be so interpreted as to permit appellees' time in the armed services to be considered as full time employment, said contract conflicts with 8 (c) of the Selective Service and Training Act and is against public policy. Such a con-

> tention is diametrically opposed to the plain reading of 8 (c) and gives no effect to the requirement that the determination shall be made on the basis of the rules applicable at the time of induction to those on furlough or leave of absence. * * *"

The recent decision of the Court of Appeals for the Seventh Circuit in the case of *Fries v. Pennsylvania R. Co.*, 195 F. (2d) 445, similarly rejected a contention that the veteran's military service must be credited as experience on the job. There the court said:

> "It is true, of course, that a failure to pass or refusal to take the examinations provided by the agreement in effect at the time plaintiff entered the military service could only result in his demotion to a 'junior brakeman,' while, under the agreement entered into while plaintiff was in the service, a failure to pass or the declination on the part of any employee who had 'actually worked' less than 528 days to take the examinations called for a cessation of his employment. The latter agreement, however, was uniformly effective as to all employees irrespective of whether they were actually at work, in the military service or on furlough or leave of absence because of ill health or for some other reason. Plaintiff contends that the time which he spent in the service should be counted as days 'actually worked,' at least to the extent of crediting him with having actually worked 528 days. We find no support in the cases or in the Act for such a theory."

Another case clearly supporting our position as to the Act's interpretation is that of *Trischler v. Universal Potteries, Inc.*, 171 F. (2d) 707, where an apprentice claimed the right to the journeyman's status that he would have achieved if he had not been in military service, and other plaintiffs claimed the right to displace employees who had been promoted to apprentice positions which plaintiffs would have been entitled to by virtue of their seniority had

they not been absent in the armed forces. In affirming a judgment denying these claims, the court said:

> ". . . that each of the appellants has failed to prove that appellee, Universal Potteries, Inc., has not considered him as having been on furlough or leave of absence during his period of training in service in the land or naval force;
>
> ". . . that each of the appellants has failed to prove that he has not been restored without loss of seniority or that he is not participating in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time he was inducted into the armed forces . . ."[8]

To the same effect is the case of *Gregory v. Louisville & N. R. Co.*, 191 F. (2d) 856 (C.A. 6), cert. den. 343 U.S. 903, adopting the conclusions of the District Court (92 F. Supp. 770) denying the claims of laborers to helper's seniority as of the date they said they would have been promoted to helper positions had they not been absent in military service. And in the case of *Raulins v. Memphis Union Station Co.*, 168 F. (2d) 466 (C.A. 6), the same court said:

> ". . . If the appellants had been on furlough or leave of absence, instead of in the service, when the vacancies occurred, they would not have obtained the promotions which they are now claiming. Section 8 of the Act provides that the employee shall be considered as having been on furlough or leave of absence during his period of training. Rule 13 of the Collective Bargaining Agreement, dealing with leave of absence, provided for such a leave for a period not exceeding 30 days with privileges of renewal, but made

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[8]Detailed facts in the *Trischler* case are stated in the District Court's opinion at 78 F. Supp. 609.

> no provision that an employee who has been absent upon leave may upon returning exercise those rights that would have been available to him if he had not been absent." (p. 469.)

The same sort of argument as petitioner urges here was also rejected by the Court of Appeals for the Seventh Circuit in the case of *Lesher v. P. R. Mallory & Co.*, 166 F. (2d) 983, where we find the following statement:

> "Plaintiffs argue that they 'were giving satisfactory service and surely would have attained seniority if the draft had not prevented it.' That, of course, is in the realm of speculation and does not aid plaintiffs' cause. The purpose of the Act, as we have shown, was to preserve for veterans upon their return the employment status they occupied at the time they left it for military service, and not to create a status which they never had, even though it might have been attained had they not been called."

Of all the various circumstances which might give rise to the question of interpretation of the Selective Training and Service Act here involved, those involving claims to vacation rights have probably created the most litigation. Such claims have become fairly well stereotyped, and are to the following effect: The amount of vacation pay, or length of paid vacation, being predicated in most contracts on length of service, the returning veteran claims that he must be given the same vacation rights that the contract would entitle him to had he remained on the job, instead of entering the armed forces, even though non-veteran employees are not credited with time on furlough or leave of absence in the computation of their vacation rights, but the Courts of Appeals for all of the Circuits in which these cases have arisen are in complete unanimity in rejecting the claims.

In *Brown v. Watt Car & Wheel Co.*, 182 F. (2d) 570,

(C.A. 6), cert. den. 340 U.S. 875, the court rejected contentions similar to those of petitioner and said:

> "It seems clear that the appellee has fully complied with the provisions of Sec. 8 (b) (B). It required the appellee to restore the appellant to his former position. The stipulated facts are that the appellee restored the appellant to his former position. The stipulated facts are that the appellee restored the appellant to his former position with the pay and seniority of said position. What rights the appellant has upon being so restored to his former position are controlled by the provisions of Sec. 8 (c) which specifically provides 'Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered * * *.' Accordingly, the question presented by the present case is the construction to be given to the provisions of Sec. 8 (c).
>
> "Nor do we agree with the further contention that under Sec. 8 (c) the time spent in the service is to be treated as time in the continuous employ of the appellee in applying Article IX, Section B of the Union contract. Sec. 8 (c) provides that the reemployed veteran shall be considered as having been on furlough or leave of absence during his period of service, and shall be entitled to participate in insurance, 'or other benefits' offered by the employer pursuant to the practices relating to employees on furlough or leave of absence in effect at the time such person was inducted. * * * non-veteran employees on furlough or leave of absence were not permitted by the rules of the employer to count such time in qualifying for vacation benefits. The reemployed veteran is by the terms of the statute in the same classification. He has not been discriminated against. He has been treated the same as the non-veteran employee. He is not entitled to more under the Act."

Decisions in other Circuits to the same effect as the *Brown* case are as follows: *Dwyer v. Crosby Co.*, 167 F.

(2d) 567, and *Siaskiewicz v. General Electric Co.*, 166 F. (2d) 463 (C.A. 2); *Dougherty v. General Motors Corp.*, 176 F. (2d) 561 (C.A. 3), cert. den. 338 U.S. 956; and *Foster v. General Motors Corp.*, 191 F. (2d) 907 (C.A. 7), cert. den. 343 U.S. 906, rehearing den. 343 U.S. 937.

Even more numerous are the unappealed District Court decisions dealing with this question and denying claims based on petitioner's theory of the scope of the statute. The most recent of these is that of Judge Delehant, of the Nebraska District Court, in the case of *Lee v. Union Pacific Railroad*, decided September 18, 1954, and unofficially reported at 34 L.R.R.M. 2776, and 26 C.C.H. Labor Cases, No. 68,698. In disposing of the same argument as is adjudged here, Judge Delehant said:

> "The statute itself is the source of the special protection and privileges afforded to a returning veteran. It gives him what its words provide, no more and no less. It has, of course, to be fairly construed to ascertain and accomplish its manifest purpose. But interpretation must not be perverted to the purposes of legislation. Liberal construction should not afford an excuse for misconstruction.
>
> "By the quoted subsection (b) (B) (1), subject to the prescribed conditions, he is entitled, if his employer was a private person or agency, as distinguished from the United States or a State or a subdivision of either, 'to be restored to the position' he left for his military service 'or to a position of like seniority, status, and pay'. And by way of explanation, it is further provided that he 'shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employes on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces.'

"Thus, an honorably discharged veteran is entitled to restoration to the position he vacated or one of like seniority, status and pay and to be regarded as having been on furlough or leave of absence during his military service. Generally, and within the thought of the Spearmon case, he is entitled to those betterments in his status which would certainly have come to him, but for his military service, solely by the passage of time. But the statute does not provide that he shall be considered as having been on active duty in his employer's service during his period of military training and service. It need not be argued that a furlough or leave of absence is radically different from continued work on one's job. Nor does the act in anywise guarantee to a returned veteran promotions or job reclassifications which he might—and even probably would—have received if he had remained out of the military service. And, the statute being silent in the matter, the courts have no power to supply a supposed gap or confer on veterans advantages which the congress did not see fit to provide. Considerations of generosity in that behalf are appropriate for legislative motivation. They have no proper place in judicial study."

Examples of other District Court opinions arriving at the same conclusion are the following:

Zaversnik v. Union Pac. R. Co., 95 F. Supp. 209;

Huffman v. Norfolk & Western Ry. Co., 71 F. Supp. 564;

Woods v. Glen Alden Coal Co., 73 F. Supp. 871;

Monticue v. Baltimore and O. R. Co., 91 F. Supp. 561;

Flynn v. Ward Leonard Electric Co., 84 F. Supp. 399; and

Cushnier v. Ford Motor Co., 89 F. Supp. 491.

It would perhaps be well at this point to mention that

while they are not relied upon in petitioner's present brief, three Court of Appeals decisions allegedly supporting petitioner's position were cited in connection with the petition for a writ of certiorari herein. These cases, *Morris v. C. & O. Ry.*, 171 F. (2d) 579 (C.A. 7), *Conner v. Penna. R.R.*, 177 F. (2d) 854 (C.A. D.C.), and *Spearmon v. Thompson*, 167 F. (2d) 626 (C.A. 8), cross-petitions for cert. den. 335 U.S. 822 (*Thompson v. Spearmon*) and 335 U.S. 886, (*Delozier v. Thompson*), were discussed in detail at pages 12-15 of the Brief of Intervening Defendants-Respondents in Opposition, previously filed herein, and because they are not now cited by petitioner we will not repeat that discussion here. However, in connection with the *Morris* case, we wish at this point to emphatically deny the charge of "lack of candor" attributed to us at p. 2 of the reply brief in support of the petition herein, filed on behalf of petitioner by Mr. Bernstein, whose firm appears of counsel on petitioner's present brief. In this connection, we respectfully refer the Court to the brief discussion of the *Morris* case and excerpts from the record therein which is attached as part of the Appendix hereto.

Previous Decisions of this Court

The question presented here has never been decided by this Court. Yet petitioner relies almost entirely upon five decisions of the Court which he says have for their *ratio decidendi* the precise theory here advanced. This is even more remarkable in view of the fact that in four of the five cases the Court rejected the claims of the plaintiff veterans, and in the fifth expressly limited the decision to the effect of the statute's prohibition against discharge for one year as a limitation upon the period during which the statutory guarantees might be enforced.

The four cases in question, *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, *Trailmobile Co. v.*

Whirls, 331 U.S. 40, *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U.S. 521, and *Ford Motor Co. v. Huffman*, 345 U.S. 330, all simply *denied* the returning veteran a *superior* status to that which he would have occupied had he not entered the armed forces. None of those cases involved claims to promotions or different positions from those which the veterans left to enter the armed forces. In each instance there was only one seniority unit or "escalator" involved. No question of job qualifications was present. And in each case the result reached was that which would follow from considering the veteran as having been on furlough or leave of absence during his military service. It was, in fact, completely immaterial to the result in those cases whether the veteran be treated as having been on furlough or leave of absence, or actually working on the job.

Those cases are, however, very pertinent here with respect to the meaning of the language used in the Court's fifth opinion, *Oakley v. Louisville & N. R. Co.*, 338 U.S. 278, upon which petitioner so heavily relies. The *Oakley* case was not, of course, decided on the merits. It did not hold, as petitioner urges (Br., p. 7) that a violation of the Act had occurred. The allegations of the complaint with respect to the positions and seniority to which the statute entitled the veterans to be restored were accepted as true, and the Court ruled only on the question, raised by the lower court's dismissal of the cases as moot, of whether the alleged statutory rights expired upon the termination of one year of reemployment by the veteran's pre-service employer. (See Note 2 to the Court's opinion.)

Petitioner's reliance on the *Oakley* case is based on the Court's description of the veteran's restored position as that which he would have held "if he had remained continuously in his civilian employment". He urges in effect that the Court, though having refrained from passing

on the merits of the case, was by implication trying to indicate how the merits should be decided. But we do not believe that the Court would so decide an issue of the sort here involved, which as we have pointed out had not previously been before it, in an opinion in which the issue is not even discussed and which fails to mention any of the cases in which the issue had been decided by other courts.

Contrary to petitioner's assertions, it seems to us that in view of the theories advanced by the parties to the *Oakley* case, in brief and oral argument, and the language in which they were stated, the calculated use of some such phrase as the reference to "continuous employment" was just about the only way the Court could avoid giving support to the position of *either* party on the merits of the case. Thus, while purporting to argue the plaintiffs' contentions with respect to the effect of the Act's one-year guarantee against discharge without cause, the Government attorneys had repeatedly used the phrase "on the job" in describing the employment status which the statute required the veteran to be considered as having occupied during his absence in military service. (See pages 9, 12, 15, 19, and 33 of the Government's brief in the *Oakley* case.) Counsel for the respondents, on the other hand (with the thought that silence on their part might be construed as acquiescence in the theory of interpretation of the statute which the Government presumably wished the Court to accept and adopt as if there had never been any question about it) had just as repeatedly urged that the veteran must be considered, in the words of the statute itself, as having been "on furlough or leave of absence". *Neither* of these phrases appears in the *Oakley* opinion, and instead we find the use of the phrase "continuous employment". We think it is apparent from the previous opinions of the Court that by this description of the veteran's status in terms of "continuous employment", the Court was able to avoid deciding whether the "on the job"

test or the "furlough or leave of absence" test properly reflected the meaning of the statute, and thus accomplish its stated purpose of limiting the *Oakley* decision to the one-year limitation question.[9]

Thus in the *Fishgold* case it was held that an employee on furlough or leave of absence has a continuing employment relationship, and that restoration of the veteran to a furlough status constituted restoration to his position of employment within the meaning of the Act. And in the *Campbell* case the Court said that the Act gives the veteran "the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force". (337 U.S., at p. 526.)

II. ADDITIONAL GROUNDS FOR AFFIRMANCE OF THE DECISION BELOW.

In the preceding portions of this brief we have discussed the principal question involved and have stated the basic objections to the merits of petitioner's contentions. However, the circumstances and chronology of this case, involving such a lengthy delay between petitioner's reemployment on November 12, 1945, and the commencement of this action on November 28, 1951 (R. 1a), suggested the additional defenses of limitations and laches which, as pointed out in our footnote 2 above, may still be urged in support of the judgment appealed from even though not ruled upon by the court below. Inasmuch as we have established that the decision below should be affirmed on the basic question presented, we shall here comment only briefly on the additional grounds for affirmance.

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[9]We have never argued, as asserted by petitioner (Br. p. 11), that the *Oakley* decision establishes a "continuous employment" standard *in preference* to either the "leave of absence" standard or the "on the job" standard, but rather that the Court refrained from making any choice between the two when the point at issue did not require a choice to be made.

Essentially, the statute sued upon requires the returning veteran's employer to reemploy him and not to discharge him without cause for a year thereafter. Yet here, petitioner's only complaint is with respect to matters which occurred more than three years after his reemployment, and this action was not filed until more than six years had elapsed from the date of such reemployment.

The Selective Training and Service Act of 1940, as amended, prescribes no period of limitation for the bringing of an action to enforce the reemployment rights guaranteed. Under these circumstances, although a federal right is being asserted, it is well established that the applicable state statute of limitations controls. See *Walsh v. Chicago Bridge & Iron Co.*, 90 F. Supp. 322, a veteran's reemployment case, where the court cited *Campbell v. City of Haverhill*, 155 U.S. 610, as illustrative of the general rule.

Thus if plaintiff's action under the reemployment provisions of the Act be deemed to have accrued at the time of his return and reemployment,[10] it would be barred by the Pennsylvania "catch-all" statute of limitations (there being no express limitations statute for actions brought under the Selective Training and Service Act) which specifies a six-year period for the bringing of actions not otherwise provided for. (Purden's Pennsylvania Statutes Annotated, Title 12, Sec. 31.)

The application of the equitable doctrine of laches to the situation here presents an even stronger case for holding the action to be barred. In cases brought under the Selective Training and Service Act, the courts have pointed out that Congress particularly desired promptness on

[10]It is of course doubtful that the claim here asserted would be construed as accruing prior to the action taken March 1, 1949, fixing the seniority ranking complained of. But, as we point out, if it did not accrue until the latter date, it is difficult to see how it could be brought under the reemployment provisions of the Act at all.

the part of all concerned in effecting the restoration of returning veterans to their places in private industry.

Some of the cases holding that delay in filing actions under this statute constituted such laches as to bar the plaintiff veteran from maintaining his action are *Daniels v. Barfield*, 77 F. Supp. 283 (a delay of 7 months); *Marque v. Stern*, 88 F. Supp. 306 (a delay of approximately 2 years); *Lacek v. Peoples Laundry Co.*, 94 F. Supp. 399 (slightly less than 4 years' delay; and *Polansky v. Elastic Stop Nut Corporation*, 78 F. Supp. 74 (13 months' delay).

Whatever the reasons for petitioner's delay in filing this suit, it is clear that the individual intervening defendants herein, who would be the only parties adversely affected by the granting of petitioner's seniority claim, have necessarily been prejudiced by the delay, in that they have been led to feel secure in the possession of a seniority ranking in connection with their employment, of which petitioner seeks to deprive them.

Finally, it seems to us that in view of the chronology of the material facts here, and the absence of any questions as to the propriety of petitioner's reemployed status during the period from the date of his reemployment, November 12, 1945, to March 1, 1949, his attack upon the agreement executed on the latter date is clearly foreclosed by this Court's holding in *Trailmobile Co. v. Whirls*, 331 U.S. 40.

CONCLUSION

For a period of approximately ten years the seniority rankings of employees on the railroads throughout the country and in general industry have been established on the basis of an interpretation of the statute which petitioner is now asking this Court to overturn. We have shown that the interpretation that has been followed is in accord-

ance with the clear language of the statute and the Congressional intent revealed by its legislative history, and has been approved with substantial unanimity in numerous decisions of the courts. The theory urged by petitioner is opposed to the plain meaning of the statute and has been specifically rejected by the courts and Congress. Petitioner has been accorded his full reemployment rights and benefits under the statute and has not been discriminated against.

For these reasons we submit that the decision reached by the courts below was correct and should be affirmed.

Respectfully submitted,

CLARENCE M. MULHOLLAND
741 National Bank Building
Toledo 4, Ohio

EDWARD J. HICKEY, JR.
620 Tower Building
Washington 5, D. C.

RICHARD R. LYMAN
741 National Bank Building
Toledo 4, Ohio
Attorneys for Intervening Defendants-Respondents System Federation No. 96 of the Railway Employes' Department, A. F. of L., and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman and Stanley J. Pavlinsky.

Of Counsel:
MULHOLLAND, ROBIE & HICKEY
741 National Bank Building
Toledo 4, Ohio
Dated at Toledo, Ohio, this
21st day of January, 1955.

APPENDIX

STATUTES INVOLVED

The material provisions of the Selective Training and Service Act of 1940, as amended (54 Stat. 885, 50 U.S.C. App. Sec. 301 et seq.), are as follows:

"SECTION 8. (a) Any person inducted into the land or naval forces under this act for training and service, who, in the judgment of those in authority over him satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3 (b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department; *Provided*, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of Navy would prove injurious to the physical or mental health of the person to whom it pertains.

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) received such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

"(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the times such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * * * * * * *

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such

provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits."

The Selective Service Act of 1948 (62 Stat. 604, 50 U.S.C. App. Sec. 451 et seq.), contains, in Section 9 thereof, provisions substantially identical to the above portion of Section 8 of the 1940 Act. However, Section 8 (c) of the 1940 Act becomes Section 9 (c) (1) of the 1948 Act. Section 9 (c) (2), an entirely new paragraph, and the relevant portion of 9 (d), formerly 8 (e), are as follows:

"(2) It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

"(d) In case any private employer fails or refuses to comply with the provisions of subsection (b)

or subsection (c) (1), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. . . ."

Discussion and record references to case of Morris v. C. & O. Ry., 171 F. (2d) 579 (C.A. 7), cert den. 336 U.S. 967 (October term, 1948, No. 638).

Petitioner's reply brief in support of the petition herein charges (p. 2) that in our brief in opposition to certiorari we erred "in asserting that in *Morris* there was an 'arrangement or practice whereby employees on furlough or leave of absence had positions tentatively assigned to them in absentia.'" It further charges us with a "lack of candor" and with having been "repeatedly and specifically advised of the factual inaccuracy of this statement". While not wishing to complicate the body of the argument in this brief with a discussion of this charge, we did not feel that it should be left unanswered.

First of all, it should be noted that petitioner misquoted the statement said to be factually inaccurate. What we said was:

> "And in the *Morris* case there was *evidence of* an arrangement or practice whereby employees on furlough or leave of absence had positions tentatively assigned to them *in absentia* pending the establishment of their qualifications."

The accuracy of this statement may readily be verified by reference to the *Morris* case transcript of record as

filed in this Court on the petition for writ of certiorari (No. 638, October Term, 1948, *The Chesapeake and Ohio Railway Company v. Gilmer S. Morris*). In fact, as a short and complete answer to petitioner's assertions, *Morris himself* was permitted to bid on a vacancy while still in military service and stationed at Santa Ana, California. (R. 15-16, and Finding 9, R. 168.) Moreover, the union chairman in the *Morris* case testified that although there was some dispute with the company about it, he had mailed bulletins of vacancies to men who were not on the territory and were on furlough or leave of absence. (R. 28-29.) The same chairman testified as follows at R. 31:

"Q. Isn't it true if a man is on sick leave, he is extended the opportunity to bid on a bulletined position?

"A. That is right."

. . . .

"Q. Is his bid accepted, pending the time that he is able to come in and take the examination to further qualify himself?

. . . .

"A. Well, the way I understand the question, the man, after he is given the bid for dispatcher, he can go ahead and accept the position, if he is qualified."

And at R. 33:

"Q. Do you ever have anybody bidding in when he is on sick leave?

"A. We have had men bid that were off of the territory. I have had a case that they refused a man who was off the territory, they refused to give him a bid. Then under those circumstances they accepted the bid.

"Q. They have accepted the bid when he was not there?

"A. Yes."

Finally, the following statement from the Court of Appeals opinion in the *Morris* case, made to distinguish it from *Raulins v. Memphis Union Station Co.*, 168 F. (2d) 466 (C.A. 6), seems to us entirely consistent with the above quoted testimony:

> "In our case the factual situation is materially different. Both the terms of the union agreement and the custom decreed that the dispatchers be taken after qualification according to their seniority from the telegraphers' roster." (171 F. (2d), at 580.)

CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the intervening Defendants-Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I have served the foregoing document upon all parties of record herein on the 21st day of January, 1955, by mailing copies thereof, in properly addressed envelopes, with air mail postage prepaid, to the following counsel of record:

Sheldon E. Bernstein, Newmyer & Bress, 1001 - 15th Street, N.W., Washington, D. C., Attorneys for Petitioner, and Harry E. Sprogell, Saul, Ewing, Remick & Saul, 2301 Packard Building, Philadelphia, Pennsylvania, Attorney for Respondent Lehigh Valley Railroad Company.

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Richard R. Lyman
741 National Bank Building
Toledo 4, Ohio